Supreme Court of Indiana.

PIPHER v. FOREDYCE.

Property in legal controversy cannot be seized by other judicial power than that under which it came into custody of the law.

Property levied upon but replevied by parties claiming to be vendees of the judgment debtor cannot be again seized on execution, so long as the replevin suit is undetermined.

FROM Daviess Circuit Court.

The opinion of the court was delivered by

ELLIOT, J.—On the 20th day of November 1880, the appellees were in possession of the personal property here in controversy claiming to have acquired title through the Nelson Iron and Coal Company. On that day an execution issued on a judgment rendered against that corporation was levied on the property, and a writ of replevin was sued out by the appellees, under which they obtained possession of the property. Afterwards, and while the appellees were in possession under writ of replevin and while the action of replevin was still undetermined, the appellant levied another execution issued against the coal company upon the same property.

It is the general rule that property in legal controversy cannot be seized by other judicial process than that under which it came into custody of the law. In *Stout* v. *La Follette*, 64 Ind. 365, the general principle is recognised and enforced. The only inquiry, therefore, is whether the principle can be deemed applicable to such a case as the one under examination. The possession of the appellees secured to them by the undertaking given in the replevin proceedings was, in legal contemplation, that of the law. Because they, instead of the sheriff, were in actual possession, did not change the character of the possession; they were in custody by virtue of the process of the court and really as its agents. Of a similar case the Supreme Court of the United States said: "On the giving of the bond the property is placed in the possession of the claimant. His custody is substituted for that of the sheriff. The property is not withdrawn from the custody of the law: *Hagan* v. *Lucas*, 10 Pet. 400.

Where vendees of a judgment debtor obtain possession of property by virtue of a writ of replevin, and by this process take it from the hands of the sheriff, it cannot, while the action of replevin

is pending undetermined, be again levied upon under another execution issued against the vendees.

This conclusion necessarily follows from the general principles we have stated, for the denial of this conclusion involves the affirmance of the proposition that property in the custody of the law may be seized under judicial process. The case of *Rhines* v. *Phelps*, 3 Gilm. 455, is directly in point, and also are the cases of *Acker* v. *White*, 25 Wend. 614; *Shelleck* v. *Phelps*, 11 Wis. 380. The text writers approve the doctrine: Hillard Remedies for Torts (3d ed.) p. 51, sect. 29; Freeman Executions 135.

Judgment affirmed.

HOWK, J., did not take part in this decision.

Whether or not property can be attached or taken under an execution when *in custodia legis*, there is scarcely any dissenting opinions of the courts; but the chief difference in the cases is that in some instances some courts consider the property in controversy in the custody of the law, while other courts, under the same state of facts, do not consider it in that condition. Then again peculiar and local statutes have invaded the general principles declared by courts as applicable to such property, and it does not appear to what extent these statutes have influenced the decisions.

Whatever principle exempts property *in custodia legis* from the levy of an execution, also exempts the same property from the levy of a writ of attachment. But the opposite conclusion must not be resorted to, for the statute allowing an attachment is not always as broad as the statute designating what property may be levied upon with an execution.

Mr. Freeman, in giving the various reasons urged why property in the hands of a sheriff or constable is not subject to the levy of an execution or writ of attachment, says: "[1] In some of the cases the judges were satisfied to rest their judgment on the general statement that such moneys were in the custody of law. [2] In other cases, it was urged that money collected on execution does not thereby become the property of the plaintiff in the writ; that, in theory of law, it is to be brought into court, and by the order of the court paid over to the person entitled thereto; [3] that the officer, upon the receipt of such money, does not thereby become the debtor of the plaintiff; and finally [4], that it is not until the money is paid over to the plaintiff that it becomes his property, and subject to execution against him. [5] It has also been suggested, as a matter of public policy, that the officers of the law, in the discharge of their duties, should be protected from the hindrance and embarrassment consequent from holding money and other property in their official custody, liable to levy and seizure in other suits:" Freeman on Ex. 130. See Herman on Ex., sect. 246; Williams on Ex. (6th Am. ed.) 2113.

Where the money is collected on an execution the second and third reasons for exempting it from seizure is certainly not very sound. In that case the officer is a trustee for the execution plaintiff and is liable to the same extent as any trustee. In no case can he return the money to the execution defendant. He must pay the money to the execution plaintiff, unless it is seized under a writ against such plaintiff. But if he has seized the

property of the execution defendant, then such property belongs to him (the defendant) and the title to it is in him. The levy under the second writ is made upon property that does not belong to the defendant in such writ; it is the taking of one man's property to pay another's debt. This, in theory of law, cannot be done.

The first reason why such property is exempt has its basis upon the general assumption that no court will permit any one to meddle with any property under its control, for such intermeddling may render its order or decree a nullity, by taking away the subject-matter of that order or decree, and, therefore, such intermeddling is punished as a contempt. In the case of sheriffs and constables where no return is required to be made to the court of the proceedings on an execution for its confirmation, this theory is hardly applicable. In cases of receivers, executors, administrators, court commissioners, and all officers compelled to report to court, it has much weight in its favor.

But it seems to us that the fifth reason is the true one. Such intermeddling is against public policy. It hinders and delays the officers in the execution of their public duties, and subjects them to such extra hazards as to deter many efficient men from taking upon themselves the duties of those offices.

In speaking of an attempt to charge a sheriff as trustee, Judge SEDGWICK, in *Wildes* v. *Bailey*, 3 Mon. 289, said: "I confess that I should have been extremely sorry to have found that the attempt to charge the officer as the trustee of the judgment creditor could have been supported. If it could, a principle would have been established that an execution, which has been justly called *finis et fructus* of legal pursuits, might be eternally defeated. A judgment debtor would have nothing more to do, when he had paid the money, than to engage a friend who had, or who would pretend he had, a demand against the creditor and fix the money in the hands of the officer, as long as there could be any pretence of keeping alive the suit; and when that could no longer be done a new action might be instituted and the same consequence ensue, and so on *ad infinitum*. This might be done independently by the debtor merely to gratify revenge; it might be done by collusion between the officer and the debtor; or it might be done even by the officer alone, to secure to himself the use of the money, which from its amount might vastly overbalance the trifling expense which he would incur. It is true that an officer thus conducting might be punished, if he were detected, but he might not be detected; and if he was detected his punishment would give no satisfaction to the creditor for his delay and vexation."

The Supreme Court of Kansas has said: "When a sheriff has levied, a marshal cannot touch, and *vice versa;* when a sheriff has levied a constable cannot touch, and *vice versa*, when a constable has levied, no other constable can touch. The levy made must, in some way, be carried out to completion, whether by sale of the property or by payment of the judgment before any legal process can attach, because if the first levy implies absolute and exclusive possession, there is nothing for the second levy to touch. There is no provision of statute for dividing the possession. The first officer owes no duty to the second officer; none to the plaintiff in the last judgment. If the process in his hands is satisfied—and it may be satisfied before and without any sale—or if the plaintiff in the judgment directs the return of the process, his duties are discharged, save that the property unsold he must return to the defendant. By no statute is he required or authorized to hold it for the benefit of any other constable, or the plaintiff in any other judgment. The defendant has a right to it by reason of his ownership, and no statute casts any

right upon the officer to retain possession for the benefit of any other officer, or will protect him against an action of the defendant for refusing to return it to him. It certainly would not be just for the second officer to charge him with the responsibility of a second levy, when he can take no possession, cannot interfere with the possession of the first officer, cannot know absolutely when the possession will cease, and when the first officer owes no duty, for it would be casting upon him a responsibility without giving him the power of protecting himself, and throwing him upon the mercy of another officer, who owes him no duty, and may have no desire to assist him:" *Jones' Stationery and Paper Co.* v. *Case*, 26 Kans. 299; s. c. 40 Am. Rep. 310. These views are amply sustained by other cases: *Hagan* v. *Lucas*, 10 Pet. 400; *Brown* v. *Clarke*, 4 How. 4.

In New York an attachment was levied upon $2000 held by the clerk of the court in lieu of an appeal bond, and on motion to release the money the attachment was sustained. In the Court of Appeals, FOLGER, J., delivered the opinion, in his usual masterly manner, saying: "We may not deny that the appellant has numerous and respectable decisions, which tend to sustain the views which he has urged upon us. From some of them we will not differ. They are those which hold that a process out of one court to its officer may not be served by a manual interference with the possession of property in the custody of the officer of another court by virtue of its process, such interference carried to the point of the exclusion of the latter officer; nor may there be an interference which, though it stops short of exclusion, claims and takes a joint possession of the property. Of this class is *Freeman* v. *Howe*, 24 How. (U. S.) 450. Neither may we deny the soundness of other decisions to the end that such process as an execution to a sheriff, which can be executed to effect only by an actual caption of the property which is sought to be subjected to it, may not be levied upon property in the hands of an officer of the court, under certain circumstances. Of this class are *Turner* v. *Fendall*, 1 Cranch (S. C.) 117; *Baker* v. *Kenworthy*, 41 N. Y. 215. But they go upon the ground that an execution directs the taking of the goods and chattels of the defendant, and that money not yet paid over to him, though he has the right to have payment of it, is not his goods, and so there can be no caption of it as such. But when the process is also against a right to have property and may be executed against an intangible right by giving notice of the existence of the process, or by garnishment, as it is called, the reason of the rule from the cases just cited, does not remain. It is not denied, I think, in that class of cases, that if there exists such relation between the officer and the defendant in the attachment suit, as that there is a credit, or the right of the latter may be deemed effects of his, there may be a garnishment: *Wilder* v. *Bailey*, 3 Mass. 289–292; or if the money has been intrusted or deposited with the officer by the attachment defendant: Id. Clearly, in the case before us, the defendant did deposit and intrust with the clerk its own money, which remained its own money when the attachment order was served upon the clerk; and that money always has been the goods, credits and effects of the defendant, deposited in the hands of the clerk, and of which he is a trustee of the defendant: Id. 294."

There is another class of cases. They hold that a debt that has passed into judgment against the debtor may not be attached in his hands: *Shinn* v. *Zimmerman*, 3 Zab. 150. It is for the reason that the debtor is then liable to the execution on the judgment, and has no chance to plead the levy of the attachment; and if the latter be held good against him he would be placed between clashing peremptory processes from different courts. It is not necessary to

inquire whether this rule is applicable to our processes of attachment, for it is not involved in the facts of this case.

There is another class of cases which comes nearer to that in hand. It is held by them, in general terms, that money in the hands of a public officer is not the subject of attachment. In some of them the decision is put upon the phrases of the statute allowing the process (*Chealy* v. *Brewer*, 7 Mass. 259), where the words of the statute required an entrusting and deposit by the debtor with the officer, which words are not in our code; and if they were are met by the facts of our case. Or the money was part of a sum of public money, held by the officer for public purposes, the right to which in the attachment debtor did not have the character of a private claim against the officer: *Bulkley* v. *Eckert*, 3 Penn. St. 368. It is not to be denied, however, that a broader rule has been laid down; that no person deriving his authority from the law, and obliged to execute it according to the rules of law, can be charged or garnisheed in respect of any money or property held by him, in virtue of that authority. See Drake on Attachments, sect. 494, *et seq.*, and cases cited. I have examined enough of those cases to perceive the rules laid down by them. In all which I have read, however, there is this to be noticed: That the money in the hands of the officer of the law did not go there directly from the debtor in the attachment, but from some other and original and independent source, over which the attachment creditor had no control as an owner: *Coppel* v. *Smith*, 4 T. R. 313. In this there is a material distinction from our case. Here the money was the absolute property of the attachment debtor, and always continued to be its property, subject to the express and unlimited right of the clerk over it, conferred principally by the act of the attachment debtor. As, when the right of the clerk to withhold the whole or a part of it ceased, that debtor could demand and have the whole or a part of it, why, as above suggested, might not the debtor have its right of proceeding against the clerk; and, if so, why not be able to transfer that right; and, if so, why may not the law transfer it? Even in some of the cases above referred to, there is a distinction taken which makes for our view—as if money is collected by a sheriff in excess of the needs of the execution, that excess is attachable: *Pierce* v. *Carlton*, 12 Ill. 358; *Lightner* v. *Steinagel*, 33 Id. 510. And the reason given is that such excess is so much money in the hands of the officer, had and received for the use of the debtor in the execution. The same reason applies here to any portion of the deposit with the clerk in excess of the amount needed to satisfy the claim of Redfield. It is further said, that if anything arises to change the relation of the officer from an official obligation to a personal liability, he will be amenable to the process of garnishment. It will be seen further on, herein, that their change was effected in the case in hand. And it is to be seen on examination that many of the reasons given against the power to attach moneys, or the right to moneys, in the hands of an officer, do not apply to the case before us. In addition to those already given is this: That it would lead to litigation in one suit over the effects in another; and would produce embarrassment and confusion to permit one process to intercept money raised on another, while in the hands of the officer; and that it might often lead to injustice, inasmuch as often the names of persons who had the real right to money raised by process do not appear upon the process by which the money was got: *Ross* v. *Clarke*, 1 Dallas (Penn.) 355; *Crane* v. *Freese*, 1 Harrison (N. J.) 305. Yet, notwithstanding this, in the case last cited, it was held that the attachment was well levied on the rights and credits of the attachment debtor in the hands of the sheriff, and a feasible way was pointed out of avoiding the dif-

ficulties spoken of, viz.: "For the officer to bring the money into court, which can control the application of the funds. In the case in hand the money is already in court, susceptible of the treatment indicated:" *Dunlop* v. *Patterson Fire Ins. Co.*, 74 N. Y. 145, affirming the same case reported in 12 Hun 627.

Those who desire to pursue the subject further will find the question discussed in the cases cited below. It suffices to add here that all the cases cannot be reconciled with each other.

REPLEVIN.—The principal case finds support in *Acker* v. *White*, 25 Wend. 614. It was there decided that property levied upon and seized by virtue of an execution, and then delivered upon a writ of replevin to a "third person," could not subsequently be levied upon by virtue of another writ against the defendant in the first execution, although the property be permitted by the plaintiff in replevin to continue in his possession and occupation. Until the claim under the first execution is disposed of, a second levy cannot be made: *Goodheart* v. *Bowen*, 2 Bradwell's App. 578.

SHERIFF.—So a sheriff having collected money upon an execution not yet returnable, and of whom the money has not been demanded, it has been decided, cannot be held as trustee of the judgment creditor on process of attachment, because the money was neither goods nor effects of the creditor, nor was it a credit in the hands of an officer; nor was it money *intrusted and deposited* in the hands of another within the meaning of those words as used in the statute: *Wilder* v. *Bailey*, 3 Mass. 289. In the early case of *Benson et ux.* v. *Flower*, Cro. Car. 166, 176, it was decided that money in the hands of a sheriff was in the custody of the law and could not be taken from him by process of law. This case is applied to chattels in *Farr* v. *Newman*, 4 T. R. 651. Such is the general rule in England: Com. Dig., *Attachment* D; Bac. Abr., *Customs of London*, H. So the Supreme Court of the United States, at an early day, decided that money collected by an officer is not, while in his hands, the property of the creditor, and of course not liable to attachment: *Turner* v. *Fendall*, 1 Cranch 117; see *Sharp* v. *Clark*, 2 Mass. 91; *Penniman* v. *Ruggles*, 6 Id. 166; *Staples* v. *Staples*, 4 Greenl. 532; 1 Leonard 30, 264; *First* v. *Miller*, 1 Ohio 134; *Farmers' Bank* v. *Beaston*, 7 Gill. & J. 421; *Overton* v. *Hill*, 1 Murph. (N. C.) 47; *Blair* v. *Cantey*, 2 Spear (S. C.) 34; *Jones* v. *Jones*, 1 Bland (Md.) 443; *Burrell* v. *Letson*, 2 Spear (S. C.) 378; 1 Strob. 279; *Zurcher* v. *Magee*, 2 Ala. 253; *Drane* v. *McGavock*, 7 Humph. 132; *Pawley* v. *Gains*, 1 Tenn. 208; *Clymer* v. *Willis*, 3 Cal. 363; *Hill* v. *La Crosse & M. Railroad Co.*, 14 Wis. 291; nor levy of an execution: *Reddick* v. *Smith*, 3 Scam. 451; *Handy* v. *Dobbin*, 12 Johns. 220; *Williams* v. *Rogers*, 5 Id. 167; *Prentiss* v. *Bliss*, 4 Vt. 513; s. c. 24 Am. Dec. 631; *contra*, *Woodbridge* v. *Morse*, 5 N. H. 519; *Conant* v. *Bicknell*, 1 D. Chip. 50; *Hurlburt* v. *Hicks*, 17 Vt. 193; *Crane* v. *Freese*, 1 Harrison (N. J.) 305; *Stebbins* v. *Peeler*, 29 Vt. 289; *Lovejoy* v. *Lee*, 35 Vt. 430; *Dolby* v. *Mullins*, 3 Humph. 437; *Hill* v. *Beach*, 1 Beasley 31.

Where the money in his hands has, however, ceased to be in his custody as an officer, it is liable to attachment: *Watson* v. *Todd*, 5 Mass. 271; *King* v. *Moore*, 6 Ala. 160; *Davidson* v. *Clayland*, 1 H. & J. 546; *Tucker* v. *Atkinson*, 1 Humph. 300; *Jaquett* v. *Palmer*, 2 Harr. (Del.) 144; *Hearn* v. *Crutcher*, 4 Yerg. 461; *Wheeler* v. *Smith*, 11 Barb. 345; *Pierce* v. *Carleton*, 12 Ill. 358; *Dickinson* v. *Palmer*, 2 Rich. Eq. (S. C.) 407; *Cole* v. *Wooster*, 2 Conn. 203; as where money is held by the officer after he has gone out of office: *Robertson* v. *Beal*, 10 Md. 125. This rule applies to the receiptor of the goods: *Cole* v. *Wooster*, *supra*; or to a sheriff where he is to pay

the money to the plaintiff instead of bringing it into court: *New Haven Saw Mill Co.* v. *Fowler*, 28 Conn. 103; nor can the sheriff apply money collected on one execution to the satisfaction of another execution held at the same time against the first judgment creditor, unless he consent to it. Such money is in the custody of the law and cannot be diverted from the course laid down for it by the law: *Thompson* v. *Brown*, 17 Pick. 462; *Dawson* v. *Holcombe*, 1 Ohio 134; *Muscott* v. *Woolworth*, 14 How. Pr. 477 (reversing same case decided at special term, 13 Id. 336); *Baker* v. *Kenworthy*, 41 N. Y. 215; *Hardy* v. *Tilton*, 68 Me. 195; s. c. 28 Am. Rep. 34; *State* v. *Taylor*, 56 Mo. 492; *Ex parte Fiearle*, 15 Id. 467; *Prentiss* v. *Bliss*, 4 Vt. 513; s. c. 24 Am. Dec. 631; *Armistead* v. *Philpot*, 1 Doug. 231; *Winton* v. *State*, 4 Ind. 321; *Wood* v. *Wood*, 4 Ad. & E. (N. S.) 397; *contra*, *Dolby* v. *Mullins*, 3 Humph. 437; s. c. 39 Am. Dec. 180.

It is further said that the specific money belongs to the sheriff, and the defendant has no leviable interest in it, and such is the rule in the above cases: *Turner* v. *Fendall*, 1 Cranch 117.

A levy upon money in the hands of an officer, being void, does not prevent a second levy on the defendant's goods and chattels: *Dubois* v. *Dubois*, 6 Cow. 494; s. c. 2 Wend. 416; *Miller* v. *Adsit*, 16 Id. 363.

But the New York cases cited have been practically overruled, and in *Wehle* v. *Conner*, 83 N. Y. 231, it was held that judgment debts and moneys collected on execution by and in the hands of a sheriff are liable to attachment under process issued in an action against the judgment creditor; nor is this right affected by the fact that the judgment debtor is also the attaching creditor. It was further held that where the property of an attachment debtor is already in the hands of the sheriff to whom the attachment is issued, no formal levy or notice is necessary to subject it to the lien of the attachment: *Dunlop* v. *Patterson Fire Ins. Co.*, 74 N. Y. 145; *contra*, *Masters* v. *Stanley*, 4 Jur. 28; s. c. 8 D. P. C. 169; *Harrison* v. *Painter*, 4 Jur. 488; s. c. 6 M. & W. 387; 8 D. P. C. 349.

Where, however, the sheriff collects more money than is necessary to satisfy an execution (as sometimes must necessarily happen), the excess may be garnisheed: *Pierce* v. *Carleton*, 12 Ill. 358; *Lightner* v. *Steinagel*, 33 Id. 510; see *Dunlop* v. *Patterson Fire Ins. Co.*, 74 N. Y. 152; s. c. 12 Hun 627; 30 Am. Rep. 283; *Orr* v. *McBryde*, 2 Car. L. Rep. 257; *Lynch* v. *Hanahan*, 9 Rich. (S. C.) 186; *Payne* v. *Billingham*, 10 Iowa 360; *Hamilton* v. *Ward*, 4 Tex. 356; *Jacquett* v. *Palmer*, 2 Harr. (Del.) 144; *Wheeler* v. *Smith*, 11 Barb. 345; *Hearn* v. *Crutcher*, 4 Yerg. 461; *contra*, *Fieldhouse* v. *Croft*, 4 East 510; *Willows* v. *Ball*, 2 B. & P. (N. R.) 376; *Bentley* v. *Clegg*, 3 Pa. L. Jr. 62; *Crossen* v. *McAllister*, 2 Id. 199; *Harrison* v. *Paynter*, 6 M. & W. 387; *Fretz* v. *Heller*, 2 W. & S. 397; *Oriental Bank* v. *Grant*, 1 W. & W. L. 16 (Vict.).

In *Pollard* v. *Ross*, 5 Mass. 319, it is said that the sheriff cannot be held as a trustee of the judgment creditor until after demand made upon him by the creditor.

Personal property under a levy on an execution is *in custodia legis* and cannot be levied upon subsequently on another execution from any other court; *Jones' Stationery and Paper Co.* v. *Case*, 26 Kans. 299; s. c. 40 Am. Rep. 310; (*Benson* v. *Berry*, 55 Barb. 620, denied); *Turner* v. *Fendall*, 1 Cranch 133; *Armistead* v. *Philpot*, Doug. 231; *Willows* v. *Ball*, 2 New R. 376; *Fieldhouse* v. *Croft*, 4 East 510; *Knight* v. *Criddle*, 9 Id. 48; *Stratford* v. *Twynam*, Jac. Rep. 418; *Jones* v. *Jones*, 1 Bland Ch. 443; s. c. 18 Am. Dec. 327.

So a deputy sheriff cannot make a valid attachment of chattels already attached by another deputy of the same sheriff,

even though the value be more than sufficient to satisfy the first attachment: *Vinton* v. *Bradford*, 13 Mass. 113; s. c. 7 Am. Dec. 119. This was upon the ground that the second deputy could not take the goods out of the possession of the first deputy, and until possession could be taken there could be no valid levy. Cited and the doctrine approved in *Bagley* v. *White*, 4 Pick. 397; *Wheeler* v. *Bacon*, 4 Gray 551; *Robinson* v. *Ensign*, 6 Id. 302, 305; *Odiorne* v. *Colley*, 2 N. H. 66; s. c. 9 Am. Dec. 39; *Walker* v. *Foxcroft*, 2 Me. 270. See, also, *Burroughs* v. *Wright*, 16 Vt. 619; *West River Bank* v. *Gorham*, 38 Id. 649; *Moore* v. *Graves*, 3 N. H. 408; *Beers* v. *Place*, 36 Conn. 578; *Strout* v. *Bradbury*, 5 Me. 313; *Oldham* v. *Scrivener*, 3 B. Mon. 579; *Harbison* v. *McCartney*, 1 Grant 474.

So one deputy sheriff may sue another deputy of the same office in trover for attaching and removing property which the plaintiff holds under a prior attachment writ: *Thompson* v. *Marsh*, 14 Mass. 269; *Draper* v. *Arnold*, 12 Id. 449; or he may even sue the sheriff himself for the tort of another deputy in taking such property on another writ: *Robinson* v. *Ensign*, 6 Gray 302.

In *Cresson* v. *Stout*, 17 Johns. 116; s. c. 8 Am. Dec. 373, it was held that if a levy is made on goods under one execution, and a second execution is issued to the same officer, the levy is sufficient for both, and the goods may be sold under the second execution as well as the first: *Leach* v. *Pine*, 41 Ill. 65; *State* v. *Doan*, 39 Mo. 44; *Van Winkle* v. *Udall*, 1 Hill 559; *Slade* v. *Van Vechten*, 11 Paige 21.

If an officer has the funds received by him on execution attached, there is no doubt that he may pay the money into court, notifying the parties of his intention so to do, and thus release himself from any further liability: *Stebbins* v. *Walker*, 2 Gr. L. 90; s. c. 25 Am. Dec. 499; *Crane* v. *Freese*, 1 Har. (N. J.) 306; see *Williamson* v. *Johnston*, 7 Halst. 86; *Sterling* v. *Van Cleve*, Id. 285; *Van Nest* v. *Yeomans*, 1 Wend. 87; *Ball* v. *Ryers*, 3 Cal. 84.

In the case of *Stebbins* v. *Walker*, it was said: "It would seem to be taking broad ground to deny to the court the power of compelling a sheriff to bring the money he has raised on execution into court. This would be to deny to the court the right and power to compel obedience to the express command of their own writ; for by the execution the sheriff is commanded to have the money in court on a certain day, to render to the plaintiff for his debt or damages, and costs. And so imperative was this command formerly considered, that Lord Ch. Baron GILBERT, in his law of executions, p. 16, says: 'No payment to the party will discharge the sheriff's power by the writ; because he is commanded by the writ to have the money in court, then publicly to pay the party, which cannot be superseded by any private agreement between the parties.' And he afterwards adds: 'If the sheriff levy the money on the defendant, and delivers it to the plaintiff, unless it be paid into court, the plaintiff has his choice of a new execution, or of a *distringas*, *&c.*, against the sheriff.' This strictness was afterwards relaxed, and it was held that the sheriff might pay the money to the party: *Rex* v. *Bird*, 2 Show. 87; *Fulwood's Case*, 4 Co. 64; *Hoe's Case*, 5 Id. 90 a; 3 Bac. Abr., tit. *Execution*, 710. But whenever the practice commenced, of permitting the sheriff to pay over the money directly to the plaintiff, it was a permissive departure from command of the writ: 3 Bac. Abr., tit. *Execution*, 716; 3 Lev. 203, 204; *Turner* v. *Fendall*, 1 Cranch 117, &c. And however convenient it may be in practice, yet it is not difficult to discern the wisdom of the old rule, which required the money to be brought into court, and 'publicly paid to the party.' The satisfaction of the judgment thereby becomes matter of record, and

put an end to further dispute on the subject."

Money paid to the sheriff to redeem land that had been sold on execution, was held exempt from seizure until it was accepted by the holder: *Davis* v. *Seymour*, 16 Minn. 210; see *Lightner* v. *Steinagel*, 33 Ill. 513.

CONSTABLE.—The rule applicable to sheriffs is applicable to constables to the same extent. The money in their hands cannot be garnisheed: *Burleson* v. *Milan*, 56 Miss. 399.

But where a constable received an attachment writ subsequent to his receipt of an execution, it was held that he might apply the surplus left, after satisfying the execution, to the attachment writ, it having in the meantime been sustained: *Wheeler* v. *Smith*, 11 Barb. 345; *Williams* v. *Rogers*, 5 Johns. 163.

And if the sheriff takes the property from him by virtue of a subsequent lien, he is liable to the constable for enough to pay off the latter's execution, if that much was realized: *Betts* v. *Hoyt*, 19 Barb. 412. Nor can the constable take the property from the sheriff: *Seymour* v. *Newton*, 17 Hun 30.

CLERK.—So money in the hands of a clerk on a judgment is *in custodia legis*, and cannot be attached: *Ross* v. *Clarke*, 1 Dall. 354; *Alston* v. *Clay*, 2 Hayw. (N. C.) 171; *Sibert* v. *Humphries*, 4 Ind. 481; *Murrell* v. *Johnson*, 3 Hill (S. C.) 12; *Bowden* v. *Schatzell*, Bailey Eq. 360; *Overton* v. *Hill*, 1 Murph. 47. So money in his possession in any manner in virtue of his office is not attachable: *Hunt* v. *Stevens*, 3 Ired. 365; *Drane* v. *McGavock*, 7 Humph. 132; *Ross* v. *Clarke*, 1 Dall. 354.

After an order of the court is made to pay over the money to the parties entitled to it, it has been held in North Carolina as not exempt: *Gaither* v. *Ballew*, 4 Jones 488. But the judgment in no case can be attached: *Daley* v. *Cunningham*, 3 La. Ann. 55; nor seized: *Hunna* v. *Bry*, 5 Id. 651; the only way is to summon the judgment debtor as garnishee.

Where, however, money is paid to the clerk to secure the payment of costs, at the commencement of the suit, and which in the event the costs are made off the defendant is to be returned to the party paying it to the clerk, such money may be attached contingently in an action against the *paying* party, for it is the money of the one paying it in until the contingency (failure to make the costs off the principal defendant) arises that makes it the property of another: *Dunlop* v. *Patterson Fire Ins. Co.*, 74 N. Y. 145.

JUSTICE OF THE PEACE.—When money is paid to a justice of the peace by a constable who has collected it upon execution, it cannot be attached: *Corbyn* v. *Bollman*, 4 W. & S. 342 (*Clark* v. *Boggs*, 6 Ala. 809, is decided to the contrary, but upon a statute peculiar to the state of Alabama); *Hooks* v. *York*, 4 Ind. 636.

COMMISSIONER.—So money in the hands of a commissioner who has sold property under an order of court is in the custody of the law, and exempt from garnishment: *Thayer* v. *Tyler*, 5 Allen 94.

MASTER IN CHANCERY.—Money in the hands of a master in chancery, being the proceeds of the sale of land in a partition suit, which, by final order of the court had been directed to be paid over to one of the parties to the suit, as belonging to him, may be attached by the creditors of such party: *Weaver* v. *Davis*, 47 Ill. 235. This was upon the ground that his liability was changed from an official to one of personal liability, and consequently he was liable to the process: *McKenzie* v. *Noble*, 13 Rich. (S. C.) 147.

TRUSTEES.—The property held by a trustee appointed by the court is also exempt from levy with an execution or writ

of attachment: *Bentley* v. *Shrieve*, 4 Md. Ch. Dec. 412; *Cockey* v. *Leister*, 12 Md. 124. But the court of Maryland has said: "We do not, however, understand from these cases that an attachment cannot be issued and laid in the hands of the trustee before a final account, and that it would not be effective upon a sum ascertained by such an account to be the distributive share of the debtor in the attachment; but that the process, before the account is stated, cannot affect the fund or the trustee, or compel any modification of the final account, for the benefit of the attaching creditor:" *McPherson* v. *Snowden*, 19 Md. 197; see *Groome* v. *Lewis*, 23 Id. 137.

RECEIVERS.—So money in the hands of a receiver appointed by the court is in custody of the law: *Columbian Book Co.* v. *De Golyer*, 115 Mass. 67; *Martin* v. *Davis*, 21 Iowa 535; *Glenn* v. *Gill*, 2 Md. 1; *County of Yuba* v. *Adams*, 7 Cal. 35; *Adams* v. *Haskell*, 6 Id. 113; *velyn* v. *Lewis*, 3 Hare 472; s. c. 5 Mod. 496; *Noe* v. *Gibson*, 7 Paige 513; *Russell* v. *East Anglian Railroad Co.*, 3 McN. & G. 104; *contra*, if the process does not tend to disturb his right: *Phelan* v. *Ganebin*, 5 Col. 14.

But money in the hands of a receiver appointed in another state is not *in custodia legis*: *Folger* v. *Columbian Ins. Co.*, 99 Mass. 267; nor if attached before the receiver is appointed: *Hubbard* v. *Hamilton Bank*, 7 Met. 340.

Nor can a creditor of a creditor reach the funds due the latter which are in the hands of a receiver. Such a proceeding would have a tendency to retard the administration of justice: *Commonwealth* v. *Hide and Leather Ins. Co.*, 119 Mass. 155.

It has been held that money in his hands cannot be attached even after the suit in which he was appointed has terminated: *Field* v. *Jones*, 11 Geo. 413; *Nielson* v. *Conner*, 6 Rob. (La.) 339; *Voerhees* v. *Sessions*, 34 Mich. 99.

Yet in Alabama it was held that the surplus remaining in his hands, where he was appointed to make sale of mortgaged property to satisfy the mortgage, was not exempt from attachment: *Langdon* v. *Lockett*, 6 Ala. 727; *Van Riswick* v. *Lamon*, 2 Mac Arthur 172.

And after an order of distribution the distributive share of a particular creditor may be seized: *Weaver* v. *Davis*, 47 Ill. 235; *Williams* v. *Jones*, 38 Md. 555.

It has been decided that land held by a receiver may be sold subject to the receiver's right and the result of the suit in which he is appointed: *Edwards* v. *Norton*, 55 Tex. 405 (but not money, *Taylor* v. *Gillean*, 23 Id. 508).

But the general rule is that the property in the hands of a receiver cannot be touched by the execution officer: *Wiswall* v. *Sampson*, 14 How. 52; *Gouverneur* v. *Warner*, 2 Sandf. 624; *Robinson* v. *A. & G. Railroad Co.*, 66 Penn. St. 160. *Contra*, *Adams* v. *Woods*, 9 Cal. 24; s. c. 8 Id. 152; 15 Id. 207; 18 Id. 30; 21 Id. 165. A levy upon such property is a contempt of court, and the court may order the levy released: *Coe* v. *Columbus, &c., Railroad Co.*, 10 Ohio St. 403; *Russell* v. *East Anglian Ry. Co.*, 3 McN. & G. 104; s. c. 6 R. W. Cas. 501–522.

This is true even though the receiver refuse to act: *Skinner* v. *Maxwell*, 68 N. C. 400; or has not reduced the property to possession: *Hagedon* v. *Bank of Wisconsin*, 1 Pin. (Wis.) 61.

ASSIGNEE.—So, money in the hands of an assignee is in the custody of the law, and cannot be attached: *Colby* v. *Coates*, 6 Cush. 558 (this, however, does not prevent the bringing of a suit, after demand, against the assignee by the creditor, who is entitled to a dividend: *Carney* v. *Dewing*, 10 Cush. 498); *Massachusetts National Bank* v. *Bullock*, 120 Mass. 86; nor is property: *Schlueter* v. *Raymond*, 7 Neb. 281.

This is true even though the money is

received by the assignee in compromise of a claim to real estate alleged to have been fraudulently conveyed by the debtor, and was not accounted for by the assignee to the commissioners of insolvency, but is paid over to the creditors *pro rata*, without any order from the commissioner: *Dewing* v. *Wentworth*, 11 Cush. 499.

And the general rule is that such money cannot be reached: *Oliver* v. *Smith*, 5 Mass. 183; *Farmers' Bank* v. *Beaston*, 7 G. & J. 421.

But after dividend declared, and the assignee has been directed to pay it over, it may be garnisheed: *Thayer* v. *Tyler*, 5 Allen 94; *Dewing* v. *Wentworth*, 11 Cush. 499.

A voluntary assignment of property to pay debts, not under any statutory proceedings, or under an order of court, does not protect the property assigned from legal process in the hands of an officer: *Leeds* v. *Sayward*, 6 N. H. 83; *Ward* v. *Lamson*, 6 Pick. 358; *Viall* v. *Bliss*, 9 Id. 13; *Brewer* v. *Pitkin*, 11 Id. 298; *Copeland* v. *Weld*, 8 Me. 411; *Todd* v. *Bucknam*, 11 Id. 41; *Jewett* v. *Barnard*, 6 Id. 381.

MONEY IN COURT.—Money paid into court is pre-eminently in the custody of the law, and can in no way be interfered with: *Farmers' Bank* v. *Beaston*, 7 G. & J. 421; *Bowden* v. *Schatzell*, Bailey Eq. 360; *Murrell* v. *Johnson*, 3 Hill (S. C.) 12; see, however, *Dunlop* v. *Putterson Fire Ins. Co.*, 74 N. Y. 145.

PUBLIC TREASURER.—So, money in the hands of a county treasurer is in custody of the law: *Chealy* v. *Brewer*, 7 Mass. 259. (The decision of *Jones* v. *Gorham*, 2 Mass. 375, and *Decoster* v. *Livermore*, 4 Id. 101, are overruled. See *Colby* v. *Coates*, 6 Cush. 558.) *Bulkley* v. *Eckert*, 3 Penn. St. 368; *Divine* v. *Harvie*, 7 Mon. (Ky.) 440; *Bank of Tennessee* v. *Dibrell*, 3 Sneed 379; *Pierson* v. *McCormick*, 1 Penn. L. J. 201; *Webb* v. *McCauley*, 4 Bush 8; or treasurer of a city: *Triebel* v. *Colburn*, 64 Ill. 376.

GOVERNMENT OFFICERS.—Officers of the United States, acting as disbursing officers, cannot be garnisheed as to the money in their hands, for such money is the money of the government so long as it remains in the officer's hands, and hence the general rule that a sovereign state cannot be sued applies to the case: *Buchanan* v. *Alexander*, 4 How. 20; *Dewey* v. *Garvey*, 130 Mass. 86; *Lodor* v. *Baker*, 39 N. J. L. 49; *Edmondson* v. *De Kalb County*, 51 Ala. 103; on grounds of public policy: *Pottier & Stymus Mfg. Co.* v. *Taylor*, 3 MacA. (D.C.) 4; *Brown* v. *Finley*, Ibid. 77; *Rollo* v. *Indes Ins. Co.*, 23 Gratt. 509; s. c. 14 Am. Rep. 147.

In New Hampshire, where the garnishee defendant was not a public officer, but acted only as a town's agent, it was held that he could be garnisheed: *Wendell* v. *Pierce*, 13 N. H. 502.

Thus, imported goods upon which the duties have not been paid, cannot be seized on execution: *Peck* v. *Jenness*, 7 How. 612; *Harris* v. *Dennie*, 3 Pet. 292. See *Taylor* v. *Carryl*, 20 How. 583; *Fisher* v. *Dandistel*, 10 Weekly Notes Cases 555.

ARREST.—Where a person was lawfully arrested and valuables were taken off his person before he was imprisoned, it was held that such valuables, while in the hands of the jailor, were liable to attachment: *Reifsnyder* v. *Lee*, 44 Iowa 101; s. c. 24 Am. Rep. 733.

ADMINISTRATOR.—So, the money of an estate is in the custody of the law, and the administrator cannot be held as a trustee of a creditor of the estate of his intestate: *Brooks* v. *Cook*, 8 Mass. 246; *Waite* v. *Osborne*, 11 Me. 185; *Marvel* v. *Houston*, 2 Harr. (Del.) 349; *Thorn* v. *Woodruff*, 5 Ark. 55; *Fowler* v. *McClelland*, Id. 188; *Welch* v. *Gurley*, 2 Hay. (N. C.) 334; *Gee* v. *Warwick*, Id. 354; *Hancock* v. *Titus*, 39 Miss. 224;

Selfridge's Appeal, 9 W. & S. 55; *Suggs* v. *Sapp*, 20 Geo. 100; *Hartle* v. *Long*, 5 Penn. St. 491; *Bivens* v. *Harper*, 59 Ill. 21; *Conway* v. *Armington*, 11 R. I. 116.

In Mississippi it is governed by statute, and the insolvency of the estate does not prevent the garnishment: *Holman* v. *Fisher*, 49 Miss. 472.

In Alabama, an administrator may be charged as garnishee in respect of a debt due from his testator to the defendant (*Terry* v. *Lindsay*, 3 Stew. & Port. 317), but not until he is summoned in his representative capacity: *Tillinghast* v. *Johnson*, 5 Ala. 514; see, however, *Mock* v. *King*, 15 Id. 66; *Moore* v. *Stainton*, 22 Id. 834; *Jackson* v. *Shipman*, 28 Id. 488.

But in New Hampshire it is held that where the administrator has been adjudged and ordered, by the proper tribunal to pay a sum certain to a creditor of the estate, he may be charged as a garnishee of the party to whom the money was ordered to be paid. The court said: "An administrator, till he is personally liable to an action in consequence of his private promise, the settlement of the estate, some decree against him, or other cause, cannot be liable to a trustee process. Because till some such event, the principal has no ground of action against him in his private capacity; and he is bound to account otherwise for the funds in his hands. The suit against him till such an event, is against him in his representative capacity, and the execution must issue to be levied *de bonis testatoris* and not *de bonis propriis*. But in the present case, the trustee was liable in his private capacity to the defendant for the dividend. The debt had been liquidated, and a decree of payment passed. The debt was also due immediately. Execution for it would run against his own goods, and the trustee process would introduce neither delay nor embarrassment in the settlement of the estate:" *Adams* v. *Barrett*, 2 N. H. 374; *Piper* v. *Piper*, 2 Id. 439. So in Missouri, *Curling* v. *Hyde*, 10 Mo. 374; *Richards* v. *Griggs*, 16 Id. 416; and in Delaware, *Fitchett* v. *Dolbee*, 3 Har. 267; but not in Vermont, *Parks* v. *Hadley*, 9 Vt. 320; nor in Pennsylvania, *Bank of Chester* v. *Ralston*, 7 Penn. St. 482; *Hess* v. *Shorb*, Id. 231; *McCreary* v. *Toper*, 10 Id. 419; nor in West Virginia, *Parker* v. *Donnally*, 4 W. Va. 648.

EXECUTOR.—In the early case of *Barnes* v. *Treat*, 7 Mass. 271 (1811), it was held that an executor cannot be charged as the trustee of one to whom a pecuniary legacy is bequeathed by the will of the testator. By a statute then in force it was provided that the "goods, effects and credits intrusted and deposited" in the hands of a stranger were attachable; and it was held that a money legacy, in the hands of an executor, was neither goods nor effects, nor in the proper sense a credit, since the relation of creditor and debtor did not exist. The court also stated that the principles which govern the attaching of money in an officer's hands were applicable to the case at bar. "In neither case is there a credit; nor was the subject, attempted to be attached, *intrusted or deposited*, in the sense of the act, in the hands of a person summoned as a trustee." This case was distinguished from preceding cases, which were decided under a provincial statute.

And as a general proposition an executor cannot he held as a garnishee, in respect of a pecuniary legacy bequeathed by his testator; neither in England: Toller on Ex. 478 (4 Am. ed.), nor in the United States: *Winchell* v. *Allen*, 1 Conn. 385; *Beckwith* v. *Baxter*, 3 N. H. 67; *Shewell* v. *Keen*, 2 Whart. (Pa.) 332; *Barnett* v. *Weaver*, Id. 418; *Picquet* v. *Swan*, 4 Mason 443; *Deblieux* v. *Hotard*, 31 La. Ann. 194; *Conway* v. *Armington*, 11 R. I. 116; *Woodward* v. *Woodward*, 4 Halst. 115. *Contra*, *Stratton* v. *Ham*, 8 Ind. 84; *Cummings* v. *Garvin*, 65 Me. 301 (under a peculiar stat-

ute). *Stratton* v. *Ham*, has appended to it a note containing a citation of all the cases up to that date (1856).

GUARDIAN.—So it was held in Massachusetts that a guardian cannot be charged by the trustee process, for the debts of his ward, upon the ground that the ward's money, while in the hands of his guardian, was in the custody of the law: *Gassett* v. *Grout*, 4 Met. 486; *Davis* v. *Drew*, 6 N. H. 399; *Vierheller* v. *Brutto*, 6 Ill. App. 95; *Hansen* v. *Butler*, 48 Me. 81; *Perry* v. *Thornton*, 7 R. I. 15; *Godbold* v. *Bass*, 12 Rich. 202. In case of a guardian of a spendthrift, it is different, and they may be charged as garnishee: *Hicks* v. *Chapman*, 10 Allen 463.

CONFLICT BETWEEN STATE AND FEDERAL COURTS.—The Supreme Court of the United States has laid down the rule that when executions from a state court and from a court of the United States are both levied, if there be no lien by judgment, the one under which a seizure is first made, must prevail, and hold the property: *Brown* v. *Clarke*, 4 How. 4.

Even where the judgment liens are equal (*Pulliam* v. *Osborne*, 17 How. 471), as between a judgment creditor and an administrator holding under the order of a probate court of a state (*Williams* v. *Benedict*, 8 Id. 107), or in favor of a receiver holding under the order of the court of a state and a judgment creditor (*Wiswall* v. *Sampson*, 14 Id. 52), or a trustee in possession under an order of court, and such a creditor: *Peale* v. *Phipps*, Id. 368.

The goods seized on an attachment by the marshal cannot be taken out of his possession by a writ of replevin, because the possession of the marshal is the possession of the court, and pending the litigation no other court of concurrent jurisdiction is permitted to disturb that possession: *Freeman* v. *Howe*, 24 How. 450; *Slocum* v. *Mayberry*, 2 Wheat. 2; *Hammock* v. *Loan and Trust Co.*, 105 U. S. 82; *Kern* v. *Huidekoper*, 103 Id. 491. But if the marshal wrongfully seize the goods, the federal courts will not protect him if a suit for trespass is brought against him: *Buck* v. *Colbath*, 3 Wall. 334.

Yet if the goods are attached and sold under an order of court given after the levy of the attachment writ, being an adjudication of their liability to sale, the officer is not liable to the assignee in bankruptcy of the defendant: *Conner* v. *Long*, 104 U. S. 228; *Johnson* v. *Bishop*, 1 Woolw. 324; *Bradley* v. *Frost*, 3 Dill. 457; *Duffield* v. *Horton*, 73 N. Y. 218.

Whiskey in bond, under the control of a United States officer, is as much in custody of the law as if in the hands of a marshal: *May* v. *Hoaglan*, 9 Bush 191.

W. W. THORNTON.

Crawfordsville, Ind.

Supreme Court of the United States.

THE E. E. BOLLES WOODEN WARE COMPANY *v.* THE UNITED STATES.

In an action for timber cut and carried away from the land of plaintiff, the measure of damages is: (1) Where the defendant is a knowing and wilful trespasser, the full value of the property at the time and place of demand; or of suit brought with no deduction for labor and expense of the defendant. (2) Where the defendant is